

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BRETT DIFFELY,

11 Plaintiff,

12 v.

13 NATIONSTAR MORTGAGE, LLC, *et al.*,

14 Defendants.
15

Case No. C17-1370 RSM

ORDER GRANTING IN PART AND
DENYING IN PART NATIONSTAR AND
WELLSFARGO'S MOTION TO DISMISS

16 **I. INTRODUCTION**

17 This matter comes before the Court on Defendants' Nationstar Mortgage, LLC
18 ("Nationstar") and Wells Fargo Bank, N.A. ("Wells Fargo") Motion to Dismiss Plaintiff's First
19 Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. #24. Defendants
20 seek dismissal of all claims against them with prejudice with respect to alleged violations of the
21 Real Estate Settlement Procedures Act ("RESPA"), Washington State's Consumer Protection Act
22 ("CPA"), and negligence under Washington State law. *Id.* Plaintiff opposes the motion. Dkt.
23 #26. For reasons discussed herein, this Court GRANTS IN PART and DENIES IN PART
24 Defendants' motion.
25
26

27 ///

28 ///

II. BACKGROUND

On September 11, 2017, Plaintiff filed a ten-count Complaint against Defendants Nationstar, Wells Fargo, and Quality Loan Service (“QLS”). Dkt. #1. On October 16, 2017, Defendants Nationstar and Wells Fargo filed a Motion to Dismiss. Dkt. #11. On October 27, 2017, Defendant QLS joined that Motion.

On December 6, 2017, this Court issued an Order, granting in part and denying in part Defendants Nationstar and Wells Fargo’s Motion to Dismiss; denying QLS’s Motion; and granting Plaintiff leave to amend his Complaint. Dkt. #22. Specifically, the Court dismissed in part Count 1, dismissed Counts 2, 5, 7, and 9 with leave to amend, and dismissed Counts 3, 4, and 6, with prejudice. Dkt. #22.

On December 20, 2017, Plaintiff filed a First Amended Complaint (“FAC”). Dkt. #23. Plaintiff alleges the following factual background to his amended claims:

10. The Loan was originated by First Independent Mortgage Company, which is now defunct. It was serviced by BAC Home Loans, Bank of America, and then Specialized Loan Servicing (“SLS”). As of the present, the servicing of the Loan is with Nationstar. The Loan is a subprime, high interest, adjustable rate loan.

11. Acting as agent of Nationstar, QLS issued a Notice of Default to Plaintiff by posting it at the Property and mailing it via certified mail (“Second NOD”) (Exhibit A, NOD issued by QLS). In this document, Nationstar declared that Wells Fargo, acting as trustee, is “the owner of the Note secured by the Deed of Trust.” However, QLS failed to furnish Plaintiff with a copy of the signed Note or the Deed of Trust referenced in the Second NOD. Other than the naked disclosure by Nationstar and QLS regarding the ownership of the Note, none of the named defendants has provided any documentary support that Plaintiff’s Loan was in fact included in the Identified Securitized Trust, or that the Identified Securitized Trust actually owns the Note, or that Wells Fargo, or Nationstar, is the holder of the Note, or that Wells Fargo is the beneficiary under the Deed of Trust that Plaintiff executed at closing.

1 12. In fact, when Bank of America serviced the Loan in 2009, its
2 foreclosing agent, Recontrust Company, previously issued another
3 Notice of Default to Plaintiff ("First NOD"). Said Notice of Default
4 made no mention of Wells Fargo or the Identified Securitized Trust's
5 involvement. Rather, Plaintiff was informed by Bank of
6 America/ReconTrust that "The creditor to whom the debt is owed:
7 MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC."
8 The serial loan servicers and inconsistent representations about who
9 the lender, creditor, owner, and the lack of disclosure of who the note
10 holder is all contribute to Plaintiff's feeling of frustration and insecurity
11 about the entity he must talk to rein in his mortgage Loan (Exhibit B,
12 First NOD).

13 13. In actuality, Plaintiff had no dealing whatsoever with either Wells
14 Fargo, as trustee of the Identified Securitized Trust, the Identified
15 Securitized Trust itself, or Mortgage Electronic Registration Systems,
16 Inc. ("MERS"). He had never received a single phone call or written
17 communication from any of these entities. To the best of his
18 knowledge, the monies used to fund the Loan at closing did not come
19 from Wells Fargo, MERS, the Identified Securitized Trust, or
20 Nationstar.

21 14. For several years, Plaintiff tried desperately to obtain a loan
22 modification with the prior loan servicer, Bank of America and
23 Specialized Loan Servicing, to no avail. After Nationstar allegedly took
24 over the servicing of the Loan, Plaintiff continued to seek a loan
25 modification. All in all, Plaintiff has submitted approximately ten (10)
26 application packages for loss mitigation, each time investing days
27 gathering and updating financial information and documentation, and
28 paying the costs for mailing, faxing, and shipping the information
overnight.

15. Nationstar, like the previous servicers, continues to solicit Plaintiff
to apply for loan modification and other loss mitigation options
(Exhibit C, Composite of Nationstar's letters to Plaintiff regarding loss
mitigation). Nationstar told Plaintiff that it has a "Foreclosure
Prevention Department," dedicated to help struggling homeowners like
Plaintiff. Nationstar uses impassioned language in its written
inducement for Plaintiff to engage in loss mitigation including,
including phrases like "To keep your account up to date, it would be
very helpful if we could talk and explore your options," "We know the
importance of homeownership and appreciate the opportunity to help
you." In July of 2017, Plaintiff was informed in writing that Nationstar
has "partnered" with Urban League of Metropolitan Seattle to help
Plaintiff "find solutions that could help avoid foreclosure, stay in your
home, and continue to enjoy the benefits of homeownership."

1 16. Ironically, during the same period of time during which Plaintiff
2 actively responded to the described written solicitation and sought
3 assistance from Nationstar to keep his home, Nationstar instructed QLS
4 to advance nonjudicial foreclosure against him and the Property. To
5 foreclose, QLS utilized a Foreclosure Loss Mitigation
6 Form/Declaration Pursuant to RCW 61.24.031. In this document,
7 Nationstar's Document Execution Specialist Chane Davis certifies
8 under penalty of perjury that Nationstar "has exercised due diligence
9 to contact the borrower as required in RCW 61.24.031(5) and the
10 borrower did not respond." (Exhibit D, Foreclosure Loss Mitigation
11 Form). Nationstar's Declaration is simply not true in that Plaintiff has
12 never stopped trying to obtain loss mitigation, regardless of who the
13 loan servicer is.

14 17. In the process of servicing the Loan, Nationstar has imposed certain
15 property inspection and property preservation fees onto the Loan. In
16 his full-time occupancy of the Property during the relevant time period,
17 Plaintiff had never witnessed any event of property inspection or
18 property preservation. He was never given any notice that such services
19 were occurring or that the fees for such services would be paid by
20 Nationstar and then charged to the Loan. When Plaintiff asked for
21 documentation in support of the necessity for such services and
22 Nationstar's proof of payments for such services, Nationstar has been
23 nonresponsive.

24 18. Nationstar's practice of imposing property inspection and property
25 preservation upon properties which are occupied by consumers has
26 been called into question in a class action lawsuit in Washington.²
27 Property inspection and preservation is the code word for Nationstar's
28 invasion of homes which are continued to be occupied by consumers
in violation of law is a pattern or business practice of Nationstar carried
out in the State of Washington and beyond.

19. In the process of servicing the Loan, Nationstar has imposed
approximately \$6,795.27 in "Legal Fees" without any explanations for
how and when these legal fees were incurred. When Plaintiff inquired
about the nature, extent, and invoices for the legal fees incurred,
Nationstar refused to respond to his specific inquiry.

20. QLS and Nationstar have provided Plaintiff with certain "Payoff
Quote" and Periodic Statements that represent inconsistent numbers
which prevents Plaintiff from knowing the true balance of what is due
and owing on the Loan in order to (1) payoff the Loan, or (2) exercise
his loss mitigation options.

1 21. QLS issued a Payoff Quote dated August 10, 2017, announcing that
2 it would require \$907,881.78 to pay off the Loan. Nationstar issued a
3 Periodic Statement dated August 18, 2017, representing a total payoff
4 of \$924,160.00 (Interest Bearing Principal Balance \$571,345.15 plus
5 Total Amount Due \$352,814.85) (Exhibit E, Comparison of QLS
6 Payoff dated August 10, 2017, Nationstar Mortgage Loan Periodic
7 Statement dated August 18, 2017, and Nationstar Mortgage Payoff
8 Statement dated August 18, 2017). There are discrepancies between the
9 itemized amounts in the Payoff Quote and August Periodic Statement.
10 **In between the time that QLS issued the Payoff Quote, and**
11 **Nationstar issued the August Periodic Statement—a mere eight**
12 **days—the amount required to cure or to pay off the Loan**
13 **increased by approximately \$16,278.22.**

14 22. Within the Periodic Statements dated July and August of 2017,
15 Nationstar has charged Plaintiff “Legal Fees” in the total amount of
16 \$6,795.27 even though no “legal” event has occurred, and fees related
17 to nonjudicial foreclosure had already been included in the total
18 amount due and owing by Nationstar. Meanwhile, the Payoff Quote
19 issued by QLS in August of 2017 omits this substantial amount for
20 Legal Fees (Exhibit F, Comparison of QLS Payoff Quote dated August
21 10, 2017, Nationstar Mortgage Loan Periodic Statement dated July 18,
22 2017, Nationstar Mortgage Loan Periodic Statement dated August 18,
23 2017, and Nationstar Mortgage Payoff Statement dated August 18,
24 2017).

25 23. Being unable to understand the defendants’ blatant inaccurate
26 accounting, Plaintiff issued a Request for Information (“RFI”) and
27 Notice of Error (“NOE”) to Nationstar, pursuant to Regulation X,
28 RESPA, dated August 11, 2017, inquiring specifically about any
property inspection or property preservation that Nationstar had
imposed on the Loan. In the RFI and NOE, Plaintiff specifically
referenced the Periodic Statement sent by Nationstar which represents
\$923.50 in property inspection or preservation fees and requested the
invoices backing the charges. Not until September 13, 2017, did
Plaintiff receive a response from Nationstar, which is dated for August
21, 2017. The response however declines to provide Plaintiff with the
specific information requested, stating “Some information you have
requested does not pertain directly to the servicing of the loan, does not
identify any specific servicing errors, and/or considered proprietary
and confidential. Therefore, this information is considered outside the
scope of information that must be provided.”

24. In the same RFI and NOE, Plaintiff requested invoices supporting
Nationstar’s imposition of fees relating to a “prior foreclosure sale.”

1 Nationstar has refused to provide the information that Plaintiff
2 specifically requested (Exhibit G, RFI, NOE sent by Diffley).

3 25. Being extremely worried about the impending nonjudicial
4 foreclosure, and the various impermissible and suspect fees and
5 charges, Plaintiff was compelled to hire the undersigned law firm to
6 assist him. On August 25, 2017, plaintiff counsel wrote to Nationstar
7 advising legal representation and requesting the "Opportunity to Meet
8 and Confer" pursuant to the Washington Foreclosure Fairness Act
9 (Exhibit H, Barraza Letter 08/25/2017). Even though Nationstar has set
10 a nonjudicial foreclosure sale date of September 29, 2017, Nationstar
11 refused to grant Plaintiff's request to meet and confer.

12 26. On September 1, 2017, staff from plaintiff counsel's office
13 contacted Nationstar to inquire about the reason(s) for the Legal Fees
14 imposed and was told that this was an "old item" and that Nationstar
15 had taken the fees and depleted the Loan's "suspense account." Given
16 these various discrepancies, Plaintiff, through his counsel, asked
17 Nationstar to postpone the nonjudicial foreclosure sale for further
18 investigation. Nationstar's employee, Sandra, #956694, responded that
19 Nationstar is not willing to do so.

20 27. Plaintiff submitted yet another application for assistance from
21 Nationstar to keep his home. He received confirmation that Nationstar
22 received his Request for Mortgage Assistance via fax (Exhibit I, Fax
23 Confirmation of RMA).

24 28. Plaintiff counsel issued to Nationstar and QLS a letter via email
25 detailing the discrepancies in the amount to cure the default and to
26 reinstate the Loan and urging both defendants to continue the
27 nonjudicial foreclosure sale for further investigation (Exhibit J,
28 Barraza Letter dated September 5, 2017).

29 29. Within the years of 2016 and 2017, Plaintiff made dozens of calls
30 to Nationstar's customer service line in order to get a handle on his
31 Loan Account. Plaintiff has spent hours composing letters and requests
32 and compiling supporting documents for these letters and requests to
33 be sent to Nationstar in his relentless effort to obtain a full accounting
34 of the Loan and to correct the errors committed by Nationstar to no
35 avail. Despite his numerous attempts including the most recent contact
36 with Nationstar through his counsel, Nationstar continues to ignore
37 Plaintiff's requests and maintains that it is still trying to get a hold of
38 Plaintiff for purpose of loss mitigation.

39 30. The amount of time that has taken Plaintiff to obtain a full
40 accounting of the Loan is time that Plaintiff could have and would have

devoted to his business whereupon he would earn a good income. The experience Plaintiff has with Nationstar has rendered him angry, frustrated, and despondent. Plaintiff has developed certain physical ailments or adverse conditions which coincide with the contacts he has made with Nationstar concerning his Loan account and his effort to obtain a loan modification.

31. Plaintiff has incurred expenses in trying to get Nationstar to respond to his requests concerning his Loan Account Status and Application for Loss Mitigation. These include office supply, copy and fax charges, delivery and mailing costs, mileage and parking. Plaintiff has also incurred attorney fees as he needed to consult with one or more lawyers about the Loan and what Nationstar has done.

32. Upon information and belief, in onboarding the Loan, Nationstar put the Loan and Plaintiff's information into its electronic database or system of record without verifying the accuracy of the information as maintained by the prior servicer whatsoever. By Nationstar's admission, the company charged the Loan with "old items" which were maintained in a non-existent suspense account. Thus, it is clear that where the data transferred by SLS has errors or inaccuracies, Nationstar has imported the errors or inaccuracies into its system without verifying or correcting them.

33. Acting in the capacity of an agent of Nationstar, and having access to the Loan's status, QLS has actual or constructive knowledge of Plaintiff's Loan based on numerous attempts he has made to ascertain the payoff information, to correct the inconsistencies in the numbers represented by Nationstar and QLS, and his continuing effort to seek loss mitigation. The fact that QLS issued the Payoff Quote and other figures to Plaintiff that are inconsistent with what Nationstar has conveyed in the same time period, including the omission of \$6,795.27 in Legal Fees, is evidence that QLS does not conduct even the most cursory task of verifying and updating the amount that Plaintiff needs to reinstate the Loan and prevent the foreclosure sale of his home.

34. Even though QLS has actual or constructive knowledge of Plaintiff's efforts to obtain loss mitigation, it continues to advance the nonjudicial foreclosure. The process by which Nationstar and QLS pursue foreclosure while pretending to engage in loss mitigation is known as "dual-tracking." Dual-tracking is specifically prohibited under the Dodd-Frank Amendment as well as under the laws of several states. QLS' failure to verify and update payoff information or reinstatement amount before conveying such information to consumers, and QLS' participation in dual-tracking, is a pattern or business practice, meaning that other consumers have been harmed, or

1 potentially will be harmed, in the same manner that QLS has harmed
2 Plaintiff in this case.

3 Dkt. #23 at ¶¶ 10-34 (citations omitted; bold in original).

4 Plaintiff now brings amended claims against Defendants Nationstar and Wells Fargo for
5 violations of RESPA and Regulation X, violations of Washington’s CPA, and negligence.
6 Plaintiff also brings a claim against Defendant Wells Fargo for breach of negligence as Principal
7 of Nationstar. Dkt. #23 at ¶¶ 35-74. The instant motion followed.

8 **III. DISCUSSION**

9 **A. Standard of Review**

10 On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
11 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most
12 favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.
13 1996). However, the Court is not required to accept as true a “legal conclusion couched as a
14 factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 555 (2007)). The Complaint “must contain sufficient factual matter,
16 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This
17 requirement is met when the plaintiff “pleads factual content that allows the court to draw the
18 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Absent facial
19 plausibility, Plaintiff’s claims must be dismissed. *Twombly*, 550 U.S. at 570.

20 Though the Court limits its Rule 12(b)(6) review to allegations of material fact set forth
21 in the Complaint, the Court may consider documents of which it has taken judicial notice. *See*
22 F.R.E. 201; *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Here, the Court should
23 take judicial notice of and consider herein the documents attached to the Declaration of Michael
24 Kapaun in support of Defendants’ Motion to Dismiss. *See* Dkt. #25, Exs. 1-5. The Court
25
26
27
28

1 previously found that judicial notice is appropriate because those documents are matters of public
2 record, having been filed in the King County Recorder's Office. *Lee v. City of Los Angeles*, 250
3 F.3d 668, 688-89 (9th Cir. 2001). Likewise, this Court should consider the documents attached
4 to Plaintiff's First Amended Complaint and incorporated by reference therein. Dkt. #23, Exs. A-
5 J; *Parrino v. FHP, Inc.*, 146 F.3d 669, 707 (9th Cir. 1998).

6 **B. Plaintiff's First Amended Complaint**

7 *1. Count One: Alleged Violation of the Real Estate Settlement Procedures Act* 8 *("RESPA") and Regulation X*

9
10 Defendants first move to dismiss Count One of the FAC. In Count One, Plaintiff alleges
11 that Defendant Nationstar violated RESPA and Regulation X in four ways. Dkt. #23 at ¶¶ 35-
12 46. Specifically, Plaintiff alleges that Nationstar committed such violations by: 1) refusing both
13 to provide Plaintiff with information about his loan and to correct the identified errors having to
14 do with property preservation and property inspection (*Id.* at ¶ 40); 2) refusing to provide Plaintiff
15 with information as requested regarding property inspection and property preservation (*Id.* at ¶
16 41); 3) failing to explain and document payments regarding legal fees as requested (*Id.* at ¶ 42);
17 and 4) failing to provide Plaintiff with a required statement concerning various account charges
18 and failing to respond to a written inquiry regarding an accurate loan pay-off amount (*Id.* at ¶
19 43). Defendants argue that Plaintiff's alleged RESPA and Regulation X violations fail because
20 1) errors during "on-boarding" of the loan and legal fees are time barred, 2) Plaintiff cannot
21 articulate errors for property inspection, 3) Plaintiff admits that Nationstar responded to his
22 requests, and 4) Plaintiff has suffered no damages. *See* Dkt. #24 at 6-10.

23
24 First, with respect to Defendants' arguments regarding on-boarding, the Court finds this
25 argument inapplicable. Plaintiff does not appear to allege a violation related to on-boarding. *See*
26 Dkt. #23. Rather, Plaintiff sets forth an allegation for the wrongful on-boarding of information
27
28

1 as background to his claim. *Id.* at ¶ 40. Therefore, Count One is not time barred. Next, with
2 respect to Nationstar’s alleged failure to “provide information as requested regarding property
3 inspection and preservation,” Defendants do not address these allegations. *See id.* Specifically,
4 Plaintiff argues that “although he has been charged with fees relating to Property Inspection, for
5 all the time that he lives at the property, he had never witnessed any such event,” Dkt. #26 at 3,
6 and that “[Nationstar] refused to provide [him] with the invoice or proof of payment.” *Id.* at 4.
7 Instead of addressing the alleged failure to “provide information as requested,” Defendants argue
8 that Plaintiff cannot articulate an error for fees incurred for inspecting the property because
9 Plaintiff’s “Deed of Trust permits the lender to assess fees for protecting lender’s interest and
10 adding those fees as additional debt under the Loan.” Dkt. #24 at 8. Plaintiff does not allege that
11 the Deed of Trust does not authorize property inspection charges. Rather, he alleges that
12 Defendants have failed to produce the documentation as requested to substantiate Nationstar’s
13 charges to his loan. *See* Dkt. #23 at ¶¶ 40-41. Because Defendants have not adequately addressed
14 Plaintiff’s allegations, the motion to dismiss is DENIED as to Count One.
15
16

17
18 *2. Count Two: Alleged Violation of the RESPA and Regulation X*

19 Next, Defendants move to dismiss Count Two of the FAC. Dkt. #24 at 10. In Count Two,
20 Plaintiff alleges additional violations of RESPA and Regulation X. Specifically, Plaintiff alleges
21 that Defendant Nationstar’s responses to his Request for Information (“RFI”) and Notice of Error
22 (“NOE”) failed to meet the statutory timeline and were substantively inadequate. Dkt. #23 at ¶¶
23 43-46 (citing 12 C.F.R. § § 1024.35 and 1024.36). Plaintiff further alleges that Nationstar refused
24 to provide him with an accurate payoff amount in response to his counsel’s letter dated September
25 5, 2017. *Id.* at ¶ 46. Defendants argue that Count Two is moot because Nationstar timely and
26 substantively responded to Plaintiff’s RFI and NOE, Dkt. #24 at 10, that they are not required to
27
28

1 respond to RFIs which request substantially similar information, *id.* at 11, and that Plaintiff has
2 not alleged adequate damages. *Id.* For the following reasons Count Two is dismissed.

3 a. Qualified Written Requests

4 RESPA requires a loan servicer to respond to a Qualified Written Request (“QWR”) from
5 a borrower. *See Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir.2012). To constitute
6 a QWR, a borrower’s request must: (1) reasonably identify the borrower’s name and account, (2)
7 state the borrower’s “reasons for the belief ... that the account is in error” or “provide sufficient
8 detail to the servicer regarding other information sought by the borrower,” and (3) seek
9 “information relating to the *servicing* of (the) loan.” *Id.* at 666-67 (quoting 12 U.S.C. §
10 2605(e)(1)(B)) (emphasis added). RESPA’s provisions relating to loan *servicing* procedures
11 should be “construed liberally” to serve the statute’s remedial purpose. *Medrano*, 704 F.3d at
12 665–66.

13
14
15 The Ninth Circuit has explained the term “servicing” under RESPA as follows:

16 [“Servicing”] encompass[es] only “receiving any scheduled periodic
17 payments from a borrower pursuant to the terms of any loan, including
18 amounts for escrow accounts ..., and making the payments of principal and
19 interest and such other payments.” “Servicing,” so defined, does not include
20 the transactions and circumstances surrounding a loan’s origination—facts
21 that would be relevant to a challenge to the validity of an underlying debt
22 or the terms of a loan agreement. Such events precede the servicer’s role in
23 receiving the borrower’s payments and making payments to the borrower’s
24 creditors.

25 *Id.* at 666–67 (quoting 12 U.S.C. § 2605(i)(3)).

26 As an initial matter, neither party in this action addresses whether Plaintiff’s RFI (*see*
27 Dkt. #23, Ex. G at 15) and NOE (*Id.* at 17) meet the statutory requirements of a QWR. Before
28 determining whether Plaintiff adequately states a claim for relief under Count Two, the Court
must first answer the threshold question of whether Plaintiff’s request letters constitute a QWR.

1 The Court finds that both of Plaintiff's August 11, 2017, letters meet *Medrano's* three
2 QWR criteria. 704 F.3d at 666. First, the letters identify Plaintiff's name and account. *See* Dkt.
3 #23, Ex. G at 15. Second, the letters state the reasons Plaintiff believes his account is in error or
4 provides details of the information he seeks. For example, Plaintiff's RFI states, "please provide
5 a copy of the INVOICE[S] evidencing the property inspection charges . . . [and] the invoices
6 evidencing the fees related to the prior foreclosure." *Id.* at 16. Third, the letters seek information
7 relating to the servicing of the loan, not just non-servicing issues, such as loan origination. *Id.*;
8 *See Pendleton v. Wells Fargo Bank, N.A.*, 993 F. Supp. 2d 1150, 1152 (C.D. Cal. 2013) (holding
9 that plaintiff sought servicing information because "she believes there are unnecessary charges to
10 the amount she is required to pay on her loan."). Accordingly, the Court finds that Plaintiff's
11 August RFI and NOE, dated August 11, 2017, are QWRs for purposes of RESPA.
12

13
14 b. Alleged failure to timely respond

15 Next, with respect to Nationstar's alleged failure to timely respond, the Court finds
16 Nationstar's response to be timely. Plaintiff's NOE and RFI are dated August 11, 2017. Dkt. #23
17 at ¶¶ 45-46. Nationstar's first acknowledgement letter is dated August 21, 2017. *See* Dkt. #25,
18 Ex. 5 at 2. However, Plaintiff alleges he did not receive that letter until September 13, 2017—
19 twenty three-days after his August 11 request. Dkt. #26 at 8. A lender's duty to acknowledge
20 and/or respond within the statutory timeline (five or 30 days) is triggered upon "*receipt*" of a
21 borrower's QWR. *See* 12 U.S.C. § § 2605(e)(1)(A)-(C) (emphasis added). RESPA explicitly
22 states that "If any servicer . . . *receives a QWR* from the borrower . . . for information relating to
23 the servicing of such loan, the servicer shall provide a written response *acknowledging receipt of*
24 *the correspondence within 5 days (excluding legal public holidays, Saturdays, and Sundays)*. 12
25 U.S.C. § 2605(e)(1)(A) (emphasis added). Further, "not later than 30 days (excluding legal public
26
27
28

1 holidays, Saturdays, and Sundays) *after the receipt of a QWR* the servicer shall” provide
2 borrowers with a detailed written communication regarding the loan account and whether any
3 changes were made. *Id.* at (e)(2) (emphasis added). Moreover, the statute does not appear to
4 mandate that a servicer’s written communication needs to be *received* by the borrower within the
5 statutory time, but merely that the servicer *respond* to a borrower’s QWR within such time. *See*
6 *Mazzei v. The Money Store*, 552 F. Supp. 2d 408, 413 (S.D.N.Y. 2008) (“defendants’ February 2,
7 2001 letter clearly fulfilled defendants’ obligation under RESPA § 2605(e)(1)(A) to acknowledge
8 receipt of plaintiff’s letter within twenty days.”).

9
10 Here, Plaintiff does not allege a date upon which Nationstar *received* his QWRs.
11 Assuming the QWRs were mailed on August 11 (Friday) with a three-day mail delivery period
12 (excluding Sunday), those QWRs would have arrived on August 15 (Tuesday). If August 15
13 (Tuesday) triggered day one of the five-day response window, Nationstar needed to acknowledge
14 receipt of Plaintiff’s QWRs by August 21 (excluding weekends). Because Nationstar’s
15 acknowledgement letter is dated August 21, Nationstar provided Plaintiff “a written response
16 acknowledging receipt of the correspondence within 5 days [of receiving a QWR]” 12 U.S.C. §
17 2605(e)(1)(A). Plaintiff has not provided legal authority to the contrary.
18
19

20 Next, regarding Plaintiff’s counsel’s letter, dated September 5, 2017, neither party
21 discusses whether that request is a QWR. But for reasons previously discussed, the Court finds
22 that the letter is a QWR under RESPA. *See* Dkt. #23, Ex. J at 28-29. Defendants argue that “the
23 within lawsuit was commenced 6 days later, which would have severed communication between
24 Plaintiff’s counsel and Nationstar,” Dkt. #24 at 10, and that Defendants are not required to
25 respond to RFIs which request substantially similar information as previously requested. *Id.* at
26 11.
27
28

1 RESPA does not express that litigation extinguishes a servicer's duty to respond to a
2 borrower's requests, and Defendants have failed to show legal authority to the contrary. *See In re*
3 *Payne*, 387 B.R. 614, 636 (Bankr. D. Kan. 2008) (holding that a premature lawsuit does not
4 excuse servicer's compliance to respond to borrower's QWR under RESPA). Further, the
5 September 5 letter requested "proof of payment for each of the Escrow and Itemized Fees and
6 Costs . . . in connection with the Loan." Dkt. #23, Ex. J at 29. That letter requested different
7 information than Plaintiff's August 11 RFI and NOE. Thus, the Court finds the September 5 letter
8 is not so substantially similar to Plaintiff's previous requests as to extinguish Nationstar's duty to
9 respond.
10

11 c. Alleged failure to substantively respond
12

13 Next, with respect to whether Nationstar substantively responded to Plaintiff's requests,
14 RESPA requires servicers to respond to a borrower's QWR in three ways. 12 U.S.C. § §
15 2605(e)(2)(A)-(C). First, a servicer can make corrections to the account (*Id.* at § (e)(2)(A));
16 second, a servicer, following an investigation, can explain or clarify why it believes the
17 borrower's account is already correct (*Id.* at § (e)(2)(B)); or third, a servicer can, after an
18 investigation, provide the borrower with a written explanation that includes the information
19 requested and explain why the information not provided cannot be obtained or provided by the
20 servicer (*Id.* at § (e)(2)(C)).
21

22 RESPA does not distinguish between a RFI and a NOE—but Regulation X does. *See* 12
23 CFR § 1024.36 (RFI) and 12 CFR § 1024.35 (Error resolution procedures). Section 1024.36 is
24 analogous to 12 U.S.C. § 2605(e)(2)(C) and Section 1024.35 is analogous to § 2605(e)(2)(B).
25 Here, Plaintiff sent Nationstar two request letters dated August 11, 2017: (1) a "Request for
26
27
28

1 Information Pursuant to [§] 1024.36 of Regulation X” (*See* Dkt. #23, Ex. G at 15) and (2) a
2 “Notice of Error under 12 CFR [§] 1024.35(b)(5).” *See Id.* at 17.

3 First, the Court finds that Nationstar conducted an investigation in response to both the
4 RFI and NOE under 12 U.S.C § § 2605(e)(2)(B)-(C). *See* Dkt. #25, Ex. 5 at 8-15 (statements like
5 “according to our records,” “furthermore, our records indicate,” and “we did not find” are likely
6 investigatory words and Plaintiff does not claim otherwise). Thus, the issue before the Court is
7 whether Plaintiff sufficiently pleaded that Nationstar failed to substantively respond to his RFI
8 and NOE under RESPA. The Court agrees with Plaintiff regarding the RFI and agrees with
9 Nationstar regarding the NOE.
10

11 With respect to the RFI, Plaintiff alleged that Nationstar violated RESPA because it failed
12 to provide him “with information [invoices for \$923.50] as requested regarding property
13 inspection and property preservation,” and by “its failure to explain and document [invoices for
14 \$6,795.27] payments regarding legal fees as requested.” Dkt. #23 at ¶ ¶ 40-42. However,
15 Plaintiff’s RFI does not mention “legal fees.” *See* Dkt. #23, Ex. G at 15. Instead, he requested
16 invoices for “property inspection charges and fees related to the prior foreclosure sale.” *Id.* at 16.
17 If Plaintiff intended that legal fees were included in fees related to the prior foreclosure sale, he
18 failed to state as such. Even so, although Nationstar explained the reasons why it found Plaintiff’s
19 property inspection fees were not erroneously charged (Dkt. #25, Ex. 5 at 10), Nationstar failed
20 to provide Plaintiff with a written “explanation of why his requested [invoice(s) evidencing
21 property inspection charges] were unavailable or cannot be obtained by the servicer.” 12 U.S.C.
22 § 2605(e)(2)(C)(i). Moreover, Nationstar stated that “some information you have requested does
23 not pertain directly to the servicing of the loan . . . and/or is considered proprietary and
24 confidential.” Dkt. #25, Ex. 5 at 8. But that blanket explanation does not provide Plaintiff with
25
26
27
28

1 enough information to determine why his requested invoices or proof of payment cannot be
2 produced. *See Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1245 (11th Cir. 2016) (holding
3 that “if servicers want to try to shelter behind their RESPA response letters, they must provide a
4 more comprehensive, supported explanation of their findings, or else introduce the supporting
5 attachments into the record and convert their motions to dismiss into motions for summary
6 judgment.”). Therefore, the Court finds that Plaintiff sufficiently pleaded that Nationstar did not
7 substantively respond to his RFI under § 2605(e)(2)(C)(i).

9 Next, with respect to the NOE, Plaintiff alleged that Nationstar violated RESPA because
10 it “has continued to refuse to . . . correct the identified errors having to do with property
11 preservation and property inspection.” Dkt. #23 at ¶ 40. However, Plaintiff’s allegations are
12 contradicted by the documents of which the Court has taken judicial notice; Nationstar’s letter to
13 Plaintiff (dated August 28, 2017) outlines that it conducted an investigation of the property
14 inspection fees and explained why it believes Plaintiff’s account is correct (citing to Plaintiff’s
15 Deed of Trust which allows for inspections). *See* Dkt. #25, Ex. 5 at 10. Thus, this Court finds that
16 Nationstar provided Plaintiff with a written explanation, including a “statement of the reasons for
17 which the servicer believes the account of the borrower is correct as determined by the servicer.”
18 12 U.S.C. § 2605(e)(2)(B)(i).

21 d. Damages

22 Finally, with respect to damages under RESPA and Regulation X, Defendants argue that
23 Plaintiff does not allege pecuniary harm arising from the alleged violations. Dkt. #24 at 10.
24 Defendants specifically contend that “the harm alleged elsewhere in the complaint relates to
25 [Plaintiff’s] attempts to block the foreclosure, the ‘but for’ cause of which is the failure to pay
26 [his] mortgage.” *Id.* Plaintiff responds that his “damages are directly caused by Nationstar’s
27
28

1 failure to comply with [RESPA].” Dkt. #26 at 9 (citing 12 U.S.C. § 2605(f)(1)(A)). Specifically,
2 Plaintiff alleges that “[w]ithin the years of 2016 and 2017, he made dozens of calls to Nationstar’s
3 service line and spent hours composing letters/requests and compiling supporting documents,”
4 the time Plaintiff has spent on his loan accounting is “time he would have devoted to his business
5 whereupon he would earn a good income,” and the experience with Nationstar has rendered him
6 “angry, frustrated, and despondent.” Dkt. #23 at ¶¶ 29-30. Further, Plaintiff alleges “office supply
7 expenses, copy and fax charges, delivery and mail costs, mileage, and parking” arising from
8 Nationstar’s actions. *Id.* at ¶ 31.

10 RESPA provides that anyone who violates RESPA shall be liable for damages to an
11 individual who brings an action under the section. *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp.
12 2d 1089, 1097 (N.D. Cal. 2009); *see* 12 U.S.C. § 2605(f). “[A]lleging a breach of RESPA duties
13 alone does not state a claim under RESPA. Plaintiff must, at a minimum, also allege that the
14 breach resulted in actual damages.” *Hutchinson v. Del. Sav. Bank FSB*, 410 F.Supp.2d 374, 383
15 (D.N.J.2006). “This pleading requirement has the effect of limiting the cause of action to
16 circumstances in which plaintiffs can show that a failure of notice has caused them actual harm.”
17 *See Singh v. Wash. Mut. Bank*, 2009 WL 2588885, at *5 (N.D. Cal. Aug. 19, 2009) (dismissing
18 RESPA claim because, “[i]n particular, plaintiffs have failed to allege any facts in support of their
19 conclusory allegation that as a result of defendants’ failure to respond, defendants are liable for
20 actual damages, costs, and attorney fees” (quotation marks and citation omitted)).

24 Here, Plaintiff’s FAC lacks facts or allegations that he suffered pecuniary loss due to
25 Defendants’ alleged RESPA violations. Specifically, Plaintiff does not allege that his damages
26 were caused “as a result of [Nationstar’s] failure to respond” to his requests. 12 U.S.C. §
27 2605(f)(1). Instead, he pleaded a laundry list of alleged damages that happened prior to those
28

1 requests. Dkt. #23 at ¶¶ 29-31. Therefore, the Court finds that Plaintiff's purported damages of
2 "office supply expenses, copy and fax charges, delivery and mail costs, mileage and parking,
3 postage, and other costs" (Dkt. #23 at ¶ 31) are not sufficient to support his claim under RESPA
4 because, as pleaded, they were not actual damages as a result of Nationstar's failure to respond
5 to his requests.

6
7 In conclusion, the Court agrees with Plaintiff regarding Nationstar's failure to
8 substantively respond to his RFI and September 5 letter, and it agrees with Defendants regarding
9 a timely response and damages. Accordingly, Count Two is dismissed.

10 *3. Count Three: Alleged Violation of the Washington Consumer Protection Act ("CPA")*

11
12 Next, Defendants move to dismiss Count Three of the FAC. In Count Three, Plaintiff
13 alleges that Nationstar violated Washington's CPA as follows:

14 (1) its actions taken in connection with mortgage loan servicing, inter alia, [occur]
15 in trade or commerce (Dkt. #23 at ¶ 49); (2) the use of inaccurate and incomplete
16 information to service Plaintiff's loan is unfair (*Id.*); (3) the imposition of over
17 \$6,000 in legal fees (without providing satisfactory explanation of its accrual) is
18 unfair (*Id.*); (4) the imposition of \$923.50 in services allegedly performed is unfair
19 (*Id.*); (5) knowingly making false material representations to third-parties is
20 deceptive (*Id.* at ¶ 50); (6) the Dodd-Frank Act is evidence that Nationstar's
21 conduct impacts a public interest (*Id.* at ¶ 51); and (7) Nationstar proximately
22 caused concrete damages to Plaintiff's property and caused him to lose money
23 which [was] spent trying to obtain [an] accurate payoff and reinstatement figures
24 [including] money paid for fuel, office supply, postage and shipping, and money
25 paid for attorney fees.

26
27 *See* Dkt. #23 at ¶ 52.

28
29 Defendants argue that none of Plaintiff's alleged acts support a CPA claim. *See* Dkt. #24
30 at 11-14. As an initial matter, Defendants assert that Plaintiff fails to identify an unfair or
31 deceptive act. *Id.* Defendants also argue that Plaintiff's CPA claim fails because he has not
32 sufficiently pleaded injury to his business or property that arose from the acts complained of. *Id.*
33 at 14. Even assuming that Nationstar's alleged acts were unfair or deceptive, occurred in a trade

1 or business, and affected the public interest, the Court finds that Plaintiff's CPA claim fails
2 because he has not pleaded facts alleging CPA-related damages.

3 The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or
4 practices in the conduct of any trade or commerce." RCW 19.86.020. To succeed on a CPA claim,
5 a plaintiff must establish (1) an unfair or deceptive act, (2) in trade or commerce, (3) that affects
6 the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal
7 link between the unfair or deceptive act complained of and the injury suffered. *Hangman Ridge*
8 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The
9 Washington State Supreme Court recently held that "consulting an attorney to dispel uncertainty
10 regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA
11 claim, although the latter is insufficient to show injury to business or property, the former is not."
12 *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529, 537 (2014) (citing
13 *Panag*, 166 Wn.2d at 62). Moreover, mere involvement in having to defend against a collection
14 action and having to prosecute a CPA counterclaim is insufficient to show injury to business or
15 property. *Panag*, 166 Wn.2d at 60 (citing *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64
16 Wn. App. 553, 564, 825 P.2d 714, 720 (1992)). To hold otherwise would be to invite defendants
17 in most, if not all, routine collection actions to allege CPA violations as counterclaims. *Sign-O-*
18 *Lite*, 64 Wn. App at 564.

19
20
21
22 In the instant matter, the Court agrees with Defendants that Plaintiff's failure to meet his
23 debt obligations is the "but for" cause of the default, and thus, his alleged expenses were incurred
24 in defending against the pending collection action. Further, Plaintiff's purported damages of
25 "money which [was] spent trying to obtain [an] accurate payoff and reinstatement figures
26 [including] money paid for fuel, office supply, postage and shipping, and money paid for attorney
27
28

1 fees,” Dkt. #23 at ¶ 52, did not arise from the alleged CPA violation because, as pleaded in the
2 FAC, those alleged costs were incurred in preparation of instituting the instant CPA action. Thus,
3 Plaintiff has not alleged facts showing that he incurred damages giving rise to a CPA claim.
4 Accordingly, Count Three is dismissed because Plaintiff has not adequately pleaded damages
5 arising from a CPA claim.
6

7 *4. Count Four: Alleged Negligence to as to Nationstar*

8 Next, Defendants move to dismiss Count Four of the FAC. *See* Dkt. #24 at 15. In Count
9 Four, Plaintiff alleges negligence against Nationstar. Dkt. #23 ¶ ¶ 53-57. Specifically, Plaintiff
10 alleges Nationstar owed him a duty of care and honesty as a loan servicer, Nationstar breached
11 its duty by inducing him to apply for a loan modification without the intention of honoring it, and
12 Nationstar’s breach proximately caused Plaintiff unnecessary accrued interest, late fees,
13 foreclosure fees, and legal fees. Dkt. #23 ¶ ¶ 53-57. Defendants argue that Plaintiff’s alleged
14 negligence claim fails because he has not pleaded the necessary elements. Dkt. #24 at 15.
15 Specifically, Defendants argue that they do not owe Plaintiff an independent duty outside of their
16 contractual relationship. *See* Dkt. #27 at 7 (citing *Eastwood v. Horse Harbor Found., Inc.*, 170
17 Wn.2d 380, 394, 241 P.3d 1256, 1264 (2010)). The Court agrees with Defendants.
18
19

20 First, in order to recover on a Washington State common law claim of negligence, a
21 plaintiff must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a
22 resulting injury, and (4) the breach as the proximate cause of the injury. *Lowman v. Wilbur*, 178
23 Wn.2d 165, 169, 309 P.3d 387, 389 (2013). As a matter of law, courts define the duty of care and
24 the risks of harm falling within the scope of that duty. *Eastwood*, 170 Wn.2d at 395. The existence
25 of a duty may be predicated upon statutory provisions or on common law principles. *Degel v.*
26 *Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728, 731 (1996).
27
28

1 Plaintiff's negligence claim is not based on contractual duties under the Deed of Trust,
2 but rather, the claim is based on common law principles. *See* Dkt. #23 at ¶¶ 53-58. Neither party
3 has identified, nor has the Court found, specific Washington case law addressing whether a
4 servicer has a common law duty of care to a borrower during loan modification negotiations in
5 Washington State. The Ninth Circuit is also silent with regard to this issue. Plaintiff points to
6 cases in California and Hawaii to support his claim. *See* Dkt. #26 at 11. The California Supreme
7 Court outlined a six-factor balancing test for determining whether a financial institution owes a
8 duty of care to a borrower. *See Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16 (1958).
9 Additionally, some District Courts in California have held that when a lender agrees to consider
10 a borrower's loan modification application, it then owes a duty of care in how it processes that
11 application. *See Gilmore v. Wells Fargo Bank N.A.*, 75 F. Supp. 3d 1255, 1268 (N.D. Cal. 2014)
12 ("plaintiff adequately alleged that Wells Fargo owed him a duty of care in processing his loan
13 modification application"); *Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451, at *7
14 (N.D. Cal. Mar. 28, 2011) ("defendant went beyond its role as a silent lender and loan servicer to
15 offer an opportunity to plaintiffs for loan modification").

16
17
18
19 However, the Court finds those cases unpersuasive because of Washington's independent
20 duty doctrine, which states "[a]n injury is remediable in tort if it traces back to the breach of a tort
21 duty arising independently of the terms of the contract." *Eastwood*, 170 Wn.2d at 394. If there is
22 no independent duty arising outside of a party's contractual duties, there can be no tort remedy.
23 *Id.* Similarly, this Court recently found that "Wells Fargo owed no independent duty to plaintiff
24 outside the terms of the Promissory Note and Deed of Trust." *Congdon v. Wells Fargo Bank,*
25 *N.A.*, 2017 WL 2443649, at *5 (W.D. Wash. June 6, 2017); *see also Schwartz v. World Sav. Bank,*
26 *No.*, 2012 WL 993295, at *7 (W.D. Wash. Mar. 23, 2012) ("[p]laintiff's have failed to allege any
27
28

1 independent duty that the Bank owed to [them] outside the terms of the Promissory Note and
2 Deed of Trust.”)

3 In the instant matter, Plaintiff admits that Nationstar does *not* owe him a fiduciary duty.
4 Dkt. #23 at ¶ 57. Instead, Plaintiff alleges a general duty of care because Nationstar allegedly
5 went beyond its role as a silent lender and loan servicer to offer an opportunity to Plaintiff for
6 loan modification. Dkt. #26 at 11. Plaintiff relies on *Ansanelli* and *Garcia, supra*, in support of
7 his claim. *Id.* While those California cases are informative, they are not persuasive because of
8 Washington State’s independent duty doctrine. *Eastwood*, 170 Wn.2d at 394. Even assuming that
9 Plaintiff adequately pleaded the resulting injury and proximate causation elements of his
10 negligence claim, he fails to adequately allege that Nationstar owed him a duty outside of their
11 contractual relationship, and therefore Count Four is dismissed.
12
13

14 4. Count Six: Alleged Negligence as to Wells Fargo as Principle of Nationstar

15 Finally, Defendants move to dismiss Count Six of the FAC. *See* Dkt. #24 at 15. In Count
16 Six, Plaintiff alleges negligence against Wells Fargo as principle of Nationstar. Dkt. #23 at ¶ ¶
17 62-63. Specifically Plaintiff alleges that “where Plaintiff has proven negligence [as to Nationstar],
18 Wells Fargo is liable to Plaintiff for actions taken by Nationstar.” *Id.* at ¶ 63. For reasons
19 previously discussed, Plaintiff has not adequately pleaded facts giving rise to a Washington State
20 negligence claim, and therefore, Count Six is dismissed with prejudice.
21
22

23 C. Leave to Amend

24 Ordinarily, leave to amend a complaint should be freely given following an order of
25 dismissal, “unless it is absolutely clear that the deficiencies of the complaint could not be cured
26 by amendment.” *Noll v. Carlson* 809 F.2d 1446, 1448 (9th Cir. 1987); *see also Desoto v. Yellow*
27 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (“A district court does not err in denying
28

1 leave to amend where the amendment would be futile.”) (citing *Reddy. V. Litton Indus., Inc.*, 912
2 F.2d 291, 296 (9th Circ. 1990)). Here, the Court concludes that granting leave to amend the
3 dismissed counts would be futile. Given that Plaintiff has already been provided with the
4 opportunity to amend his initial Complaint, and given that he has attempted to remedy previously
5 identified deficiencies but failed to do so, the Court finds that the dismissed counts cannot be
6 cured by further amendment, particularly given the documentary evidence provided by
7 Defendants and the invalidity of Plaintiff’s primary legal arguments as discussed above.
8 Accordingly, Plaintiff’s Counts two, three, four, and six are dismissed with prejudice.
9

10 11 **IV. CONCLUSION**

12
13 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
14 and the remainder of the record, the Court hereby finds and ORDERS that Defendants Nationstar
15 and Wells Fargo’s Motion to Dismiss (Dkt. #24) is GRANTED IN PART and DENIED IN PART
16 as discussed above.
17

18
19 DATED this 11th day of April 2018.

20
21 

22 RICARDO S. MARTINEZ
23 CHIEF UNITED STATES DISTRICT JUDGE
24
25
26
27
28